

CANYON DEVELOPMENT
v.
ACTING SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-54-A

Decided February 20, 1998

Appeal from cancellation of a lease of allotted land on the Agua Caliente Reservation.

Affirmed.

1. Indians: Contracts: Generally--Indians: Leases and Permits:
Generally

The construction of leases of Indian land is a matter of Federal law, as developed in decisions of the Federal courts and the Board of Indian Appeals. Where there are no Federal cases on point, state law may furnish a convenient source for the general law of contracts to the extent it does not conflict with the Federal interest in developing and protecting the use of Indian resources.

APPEARANCES: Bonnie Garland Guss, Esq., Palm Springs, California, and Marsha Kostura Schmidt, Esq., Washington, D.C., for Appellant; Daniel G. Shillito, Esq., Field Solicitor, U.S. Department of the Interior, Palm Springs, California, for the Acting Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Canyon Development seeks review of an October 9, 1996, decision of the Acting Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), cancelling Palm Springs Lease No. PSL-1147. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

On November 15, 1960, the Indian landowners of approximately 530 acres of allotted land on the Agua Caliente Reservation, Palm Springs, California, entered into Lease No. PSL-47 with the Palm Canyon Country Club. The lease was amended and restated in its entirety in Supplemental Agreement No. 6 to Lease No. PSL-47, dated March 1, 1974. Lease No. PSL-47 was assigned several times. The Americana Hotel and Realty Corporation (AHRC), which held a deed of trust on the leasehold interest, began nonjudicial foreclosure proceedings in August 1987. On September 19, 1988, AHRC was the successful credit

bidder at a foreclosure sale and thereafter elected to operate the property as a trustee pursuant to Paragraph 24 of Supplemental Agreement No. 6. 1/

In December 1989, AHRC entered into an agreement to sell its interest to Appellant. The 1989 agreement was amended on December 19, 1991. In 1992, the landowners and Appellant entered into Lease No. PSL-1147 for the purpose of constructing, maintaining, and operating a hotel and golf course and for ancillary uses. The lease was approved by the Assistant Secretary -Indian Affairs on June 10, 1992, and commenced on the date of approval. Recital E of Lease No. PSL-1147 states: "Concurrently with the Commencement Date of this Lease, AHRC has assigned to Tenant [i.e., Appellant] its interest under Lease No. PSL-47 with respect to a portion of the Premises." Despite this statement, the assignment had not taken place on June 10, 1992, and Lease No. PSL-47 therefore remained in effect. The assignment had not taken place because Appellant had not obtained financing for its purchase of AHRC's interest.

Appellant made monthly rental payments under Lease No. PSL-1147 (hereafter, the Lease) through June 1995 but thereafter ceased making payments. On August 4, 1995, the landowners, through their Lease Council, requested that BIA not proceed immediately against Appellant but, rather, allow Appellant an opportunity to complete its financing for the project. On April 4, 1996, when Appellant had not resumed paying rent and had not obtained financing, the Lease Council requested that BIA initiate default proceedings.

By letter of May 6, 1996, the Director, Palm Springs Field Office (Office Director; PSFO) and the Lease Council gave Appellant the notice required by Paragraph 24.1(a) of the Lease. 2/ The letter included an exact calculation of the amount of past due rent, interest, and late charges, based upon the presumption that Appellant would make payment on May 15, 1996. The total amount shown as due was \$613,946.64.

Appellant received this letter on May 9, 1996, and, by letter of May 10, 1996, requested forbearance, stating that it expected to have financing within 90 days. When it had not resumed making rental payments by August 30, 1996, the Area Director wrote to Appellant, stating:

1/ These facts are recited at page 1 of Lease No. PSL-1147 and page 10 of a Dec. 19, 1991, "Amended and Restated Agreement for Purchase and Sale of Real Property and Joint Escrow Instructions" between AHRC and Appellant.

2/ Paragraph 24.1 provides:

"Default of Tenant. The occurrence or existence of any one or more of the following events or circumstances shall constitute an event of default * * * hereunder by Tenant:

"(a) Tenant fails to pay Landlord any installment of Guaranteed Minimum Annual Rent [(GMAR)] or Additional Land Rent or Additional Rent as and when the same shall become due and payable, and such default continues for a period of ten (10) days after written notice from Landlord."

In accordance with [25 C.F.R. §] 162.14, Violation of Lease, you are hereby given notice that you are in default of Article 5, Rental and Article 24, Default and Certain Remedies; Bankruptcy, of your lease and you have ten (10) days from date of receipt of this letter to show cause why your Lease Number PSL-1147 should not be cancelled.

The August 30, 1996, letter was mailed to Appellant by certified mail but was returned to the Area Office as unclaimed. 3/ The Area Office then remailed the letter by regular mail, together with an affidavit of service. Based upon the expected delivery time for the second mailing, the Area Office calculated that Appellant had until the close of business October 7, 1996, to respond to the letter.

On October 9, 1996, the Area Director cancelled the lease. The notice of cancellation was mailed to the same two addresses for Appellant as the August 30, 1996, show-cause letter. Both copies were sent by certified mail. The copy sent to Appellant at the Beverly Hills address was signed for on October 24, 1996, according to the return receipt for certified mail (green card). The copy sent to Brian Adler and David Solomon at the Palm Springs address was again returned as unclaimed. Again, the Area Office remailed the letter by regular mail, together with an affidavit of service. The remailed letter was addressed to Brian Adler and Joseph Solomon.

Appellant appealed the October 9, 1996, cancellation decision to the Board. Briefing was completed on April 28, 1997, at which time the case became ripe for decision. On May 29, 1997, the Board was informed that an involuntary petition under Chapter 11 of the Bankruptcy Code had been filed against Appellant on May 5, 1997, giving rise to an automatic stay under 11 U.S.C. § 362 (1994). In re Canyon Development, No. LA 97-2048 VZ (Bankr. C.D. Cal.). The Board stayed proceedings in this appeal on June 2, 1997. On November 10, 1997, the Area Director furnished the Board with a copy of an October 27, 1997, order of the Bankruptcy Court lifting the section 362 stay as to this appeal. On November 12, 1997, the Board restored this appeal to its active docket.

Discussion and Conclusions

Appellant made a number of arguments in its opening brief. However, in its reply brief, it withdrew all but two of those arguments. 4/ Appellant's two remaining arguments are: (1) The lease cancellation must be rescinded because BIA refused to provide Appellant's prospective lender with an estop-

3/ The certified copy of the Aug. 30, 1996, letter was addressed to Brian Adler and David Solomon at 2850 South Palm Canyon Drive, Palm Springs, California 92264. The Area Office also mailed a copy of this letter to Appellant at 2250 Summitridge Drive, Beverly Hills, California 90210, apparently by regular mail.

4/ Appellant also withdrew its motion to supplement the record.

pel certificate and (2) the lease cancellation must be rescinded because BIA failed to give proper notice of cancellation.

With respect to the first of these two arguments, Appellant contended in its opening brief:

As was typical in real estate transactions of this type, [Appellant's] prospective lender, C.S. First Boston, requested an estoppel statement from both the Sacramento Area Office and the [PSFO] of [BIA]. [BIA] flatly denied the request. Such refusal had dire consequences for [Appellant]. Without an estoppel statement from [BIA], C.S. First Boston informed [Appellant] that it would not provide the financing needed by [Appellant] to bring the Lessors under Lease PSL-1147 current and commence development of its project.

By failing to follow the express language of Lease PSL-1147 by refusing to issue an Estoppel Certificate in contravention of Paragraph 31.1, [BIA] acted arbitrarily and capriciously. For this reason, the cancellation of Lease No. PSL-1147 must be rescinded.

Appellant's Opening Brief at 13.

In his answer brief, the Area Director denied that BIA had ever been requested to issue an estoppel certificate. He submitted affidavits from the Office Director and the PSFO Realty Officer, both of whom state that, after learning of the allegation made in Appellant's opening brief, they reviewed their files concerning this lease and found no evidence that Appellant had provided BIA with "any financing documents, Estoppel Statements or any other document pertaining to the financing of the Canyon Development property by C.S. First Boston." Both affidavits further state that, had such documents been presented to the Area Office, they would have been transmitted to the PSFO, which had the authority to act on them. Finally, the affidavit of the PSFO Realty Officer states that she telephoned the Area Realty Officer, who stated that she had never received any "encumbrance document, estoppel statement, deed of trust, etc." from either Appellant or C.S. First Boston and also confirmed that, had she received such documents, she would have transmitted them to the PSFO.

In its reply brief, Appellant amends its earlier argument to contend that the request for an estoppel certificate was made only to the Area Office and not to the PSFO. Appellant submits a copy of an October 7, 1996, memorandum from Peter Carlo to Joseph Solomon. 5/ The memorandum states:

5/ Joseph Solomon is a principal of Appellant. Neither the affiliation nor the position of Peter Carlo is clear from Appellant's filing, although his Oct. 7, 1996, memorandum suggests that he has some connection with Deakin & Associates, Inc., of Clearwater, Florida.

I called [BIA] in Sacramento. The purpose of my call was to confirm [Lease No. PSL-1147] and certain provisions contained therein. Additionally, an inquiry was made as to the granting of an Estoppel [sic] for our clients. Namely, Societe Generale and First Boston. (This was part of our private placement document requests.)

This question was asked of a representative of the BIA (I was then put on hold for a considerable length of time) who went about his internal inquiry. When he returned to the phone, he informed me that the lease payments were past due, and an Estoppel [sic] could not be granted. Further, the BIA is considering implementing the lease cancellation provisions.

Other than this memorandum, Appellant offers no evidence of any contact with BIA concerning an estoppel certificate.

Paragraph 31.1 of Lease No. PSL-1147 provides:

Estoppel Certificate. Tenant and Landlord and the Secretary shall at any time and from time to time, but not more often than [sic] is reasonable under the circumstances, upon not less than fifteen (15) days' prior written request by the other party or any Leasehold Mortgagee execute and deliver a written certificate certifying:

(a) That this Lease is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications).

(b) The dates to which the [GMAR], Additional Land Rent, and Additional Rent have been paid in advance, if any.

(c) Whether or not, to the knowledge of such party, there is any existing Event of Default (or default by Landlord) on the part of the requesting party (or on the part of Tenant if a Leasehold Mortgagee is the requesting party) under this Lease and, if so, specifying each such Event of Default (or default by Landlord).

(d) Whether or not, to the knowledge of such party, any event has occurred or failed to occur which, with the passage of time or the giving of notice, or both, would constitute an Event of Default (or default by Landlord) on the part of the requesting party (or on the part of Tenant if a Leasehold Mortgagee is the requesting party) and, if so, specifying each such event.

(e) As to any Leasehold Mortgagee, based solely on the information furnished by Tenant or Leasehold Mortgagee, that if such information is true, the Leasehold Mortgagee qualifies as a "Leasehold Mortgagee" and an institutional lender as commonly known in the financial community.

(f) In the case of the Leasehold Mortgagee, as to such other matters as the Leasehold Mortgagee may reasonably request.

Appellant has not shown that it or C.S. First Boston made the written request required by Paragraph 31.1. Accordingly, it has not shown that BIA acted in contravention of that paragraph. 6/ The Board rejects Appellant's argument that the lease cancellation must be rescinded because BIA refused to issue an estoppel certificate.

With respect to its argument that BIA failed to give proper notice of cancellation, Appellant contends:

The Notice of Cancellation dated October 9, 1996, was mailed to Mr. Brian Adler and Mr. David Solomon. The notice provision in Lease No. PSL-1147 set forth in Article 22 clearly provides that the notice should be mailed to [Appellant]. Brian Adler is not at the Palm Springs address, and there is no party named David Solomon.

Secondly, the Notice of Cancellation fails to state a sum certain which is due. Rather, the notice states delinquent rent, plus "pro-rated GMAR, plus interest payments, plus late charges." The prior notice of August 30, 1996, likewise fails to set forth a sum certain which [Appellant] could pay in order to cure the default. Without setting forth a sum certain, [Appellant] was unable to determine the amount which was required in order to cure the default.

6/ In any event, the Lease provides a remedy for the failure of a party to deliver an estoppel certificate. Paragraph 31.3 provides:

"Failure to Deliver Certificate. If either party shall fail or refuse to execute, acknowledge and deliver any estoppel certificate within twenty (20) days after written request therefor, the requesting party shall (unless such requesting party knows any of the following to be untrue) be entitled to deliver to a prospective purchaser or permitted assignee, Leasehold Mortgagee or subtenant, a certificate in the name of the party who failed to deliver such certificate (and the recipient thereof shall be entitled to rely on such certificate) stating that (except as the requesting party otherwise indicates):

"(a) This Lease is unmodified and in full force and effect; and

"(b) Payments of [GMAR], Additional Land Rent, and Additional Rent are current and have not been paid for any period subsequent to the billing period then in progress; and

"(c) To the knowledge of such party, there are then no defaults or Events of Default under this Lease; and

"(d) To the knowledge of such party, no event has occurred or failed to occur which, with the passage of time or the giving of notice, or both, would constitute an Event of Default or default by Landlord or give rise to an Event of Default or default by Landlord hereunder."

Finally, 25 CFR Section 162.14 provides that the Notice of Cancellation shall include demand for payment for all obligations and for possession of the premises. The demand for possession of the premises was not set forth in the Notice of Cancellation, nor was a sum certain calculated for the payment of obligations.

Appellant's Opening Brief at 13-14.

Appellant cites Article 22 of the Lease, which is titled "LAND EXCHANGE." Appellant undoubtedly intended to cite Article 32, "NOTICES," which provides in relevant part: "All notices, demands, requests, consents, approvals or communications from Landlord to Tenant shall be addressed to Tenant at: Canyon Development[,], 2850 South Palm Canyon Drive[,], Palm Springs, California 92264[;] With copy to: Canyon Development[,], 2250 Summitridge Drive[,], Beverly Hills, California 90210."

Appellant apparently concedes that it received the notice of cancellation. It makes no argument to the contrary. Nor does it dispute the affidavit submitted with the Area Director's answer brief, which states that Joseph Solomon acknowledged that he had received the notice of cancellation. ⁷/ Given Appellant's apparent concession and the fact that the notice of cancellation sent to Appellant at its Beverly Hills address was signed for, the Board finds that Appellant received the notice of cancellation.

Appellant's argument seems to be that, even though it received the notice of cancellation, a BIA error in addressing the notice renders the cancellation invalid.

BIA's error was minor. It mailed the notices to the correct addresses in all cases. Although it initially addressed the notice to Brian Adler and David Solomon, rather than Brian Adler and Joseph Solomon, it corrected the error with respect to Solomon's first name when it remailed the letter. Appellant apparently does not dispute that Brian Adler is a principal of Appellant. Rather, its only complaint is that Adler was not at the Palm Springs address.

In light of the fact that Appellant received the notice of cancellation, the Board finds that the minor error in BIA's addressing of the notice is not a basis for rescinding the cancellation.

Appellant also contends that neither the October 9, 1996, notice of cancellation nor the August 30, 1996, show-cause letter stated a sum certain with respect to the amount owed by Appellant.

⁷/ The affidavit was provided by Michael D. Harris, Esq., counsel for the Lease Council, and states, inter alia, that he spoke with Joseph Solomon after Oct. 9, 1996, and that Mr. Solomon "stated * * * that he received the BIA's cancellation."

The August 30, 1996, letter stated:

You owe eleven (11) monthly rental payments for the period July 10, 1995 through June 9, 1996 of \$550,000.00 and also two (2) monthly rental payments of \$58,333.34 per month (which totals \$116,666.68) plus any prorated rent which would be applicable from August 10, 1996 until payment of the GMAR is made. The total payments you owe are as follows: (1) \$666,666.68 [13 monthly rental payments - July 10, 1995 through August 9, 1996]; (2) prorated GMAR computed from August 10, 1996 until payment of the GMAR is made; (3) interest payments and (4) late charges. * * *

You should contact the PSFO concerning the total payments owed on PSL-1147 so that these payments can be accurately computed. Interest payments and late charges are explained below.

* * * * *

Article 24, Subarticle 24.2, Remedies, gives the landlord (landowner) the right to terminate the Lease by giving tenant (lessee) notice of such termination in writing at any time. Subarticle 24.2(d) allows the landlord (lessor) to charge and tenant (lessee) shall pay upon demand, interest thereon at the Default Rate. [8/] Subarticle 24.2(e) states that tenant (lessee) acknowledges that the late payment by tenant (lessee) to landlord (lessor) of rent and other sums due will cause landlord (lessor) to incur costs not contemplated by this lease, the exact amount of which will be extremely difficult to ascertain. Accordingly, if any installment of rent or any other sum due from tenant (lessee) shall not be received by landlord (lessor) after such amount shall be due, then without any requirement for notice to tenant (lessee), tenant (lessee) shall pay to landlord (lessor) a late charge equal to (i) two percent (2%) of such overdue amount for the first two (2) times in any annual period that such amount is overdue, and (ii) six percent (6%) of any overdue amount for the

8/ "Default Rate" is defined in the Lease as "an interest rate equal to the lesser of (i) five percent (5%) over the Reference Rate or (ii) the maximum interest rate permitted by law, if applicable law imposes limitations upon the rate that could otherwise be charged."

Paragraph 1.1(ag).

"Reference Rate" is defined as "[t]he interest rate announced by Bank of America (or if Bank of America no longer announces such rate, Citibank) from time to time as its prime rate or reference rate, or, if both such banks shall cease to announce a prime rate or reference rate, then the average prime rate or reference rate of the three largest (measured by total assets) banking institutions in the continental United States then announcing a prime rate or reference rate."

Paragraph 1.1(ch).

third and all subsequent times in any annual period that an installment of rent or other sums due from tenant (lessee) become overdue. [Bracketed material in original.]

Aug. 30, 1996, Show-cause Letter at 1-2.

The October 9, 1996, notice of cancellation stated:

The delinquent rental is computed as follows: Eleven (11) monthly rental payments for the period July 10, 1995 through June 9, 1996 of \$550,000.00 and also four (4) monthly rental payments of \$58,333.34 per month (which totals \$233,333.36) plus any prorated rent which would be applicable from October 10, 1996 until payment of the GMAR is made. The total payments you owe are as follows: (1) \$783,333.36 [15 monthly rental payments - July 10, 1995 through October 9, 1996]; (2) prorated GMAR computed from October 10, 1996 until payment of the GMAR is made; (3) interest payments and (4) late charges. The aforementioned delinquent rental payment [\$783,333.36 + prorated GMAR + interest payments + late charges] is hereby demanded in order to make your delinquent rental payments current. [Bracketed material in original.]

Oct. 9, 1996, Notice of Cancellation at 2.

Appellant states that it was unable to calculate the precise amount it owed from the information in these two letters. In the case of both letters, the precise amount of prorated GMAR, interest, and late fees could not be finally calculated until Appellant determined the day upon which it would make payment. The August 30, 1996, show-cause letter invited Appellant to contact the PSFO to obtain such a precise calculation. Both letters described the basis upon which the calculations would be made, as did the Lease itself. Either by contacting the PSFO, as it was invited to do, or by doing its own calculations, Appellant could easily have determined the precise amount it would have to pay on any particular day.

Appellant points to nothing in the Lease itself or in the Federal law governing this lease which required the Area Director to include any more information in his August 30, 1996, and October 9, 1996, letters.

In its reply brief, Appellant impliedly argues, for the first time, that the law of the State of California is applicable to the interpretation of the Lease. The Board normally does not address arguments raised for the first time in a reply brief, because the other parties have not had an opportunity to address the issue. See, e.g., Winlock Veneer Co. v. Juneau Area Director, 28 IBIA 149 (1995). However, in order to dispose of the remaining issues in this case, the Board will address this issue.

Paragraph 43.14 of the Lease provides: "This lease shall be governed exclusively by the provisions hereof, by the laws of the United States, by the laws of California to the extent applicable, and such other laws as may

be applicable." This provision does not manifest an intent by the parties to make California law applicable to the interpretation of the Lease except to the extent that it would be applicable as a matter of law.

[1] In Kearny Street Real Estate Co. L.P. v Sacramento Area Director, 28 IBIA 4, 14-15 (1995), the Board addressed an argument that California law governed the interpretation of the lease at issue in that case. The Board there concluded, as it had in earlier cases, that the interpretation of leases of Indian land is governed by Federal law although, in the absence of Federal law on point, state law may furnish a convenient source of the general law of contracts, to the extent it does not conflict with the Federal interest in developing and protecting the use of Indian resources.

Appellant's entire argument with respect to California law is as follows:

The law in California is clear that a notice to pay rent in an unlawful detainer action must contain the precise amount of the rent which is due. The history of this rule was explained by the California Supreme Court in J.B. Hill Company v. Mary E. Pinque (1919) 179 C. 759. The California Supreme Court stated as follows:

It was the settled rule at common law that a demand for payment of the exact sum due was a necessary prerequisite to a forfeiture of a lease for nonpayment of rent. The same rule was laid down in this State at an early date (Gage v. Bates, 40 Cal. 384; O'Connor v. Kelly, 41 Cal. 434), and these decisions have never been questioned. (Mossi v. Fairbanks, 19 Cal. App. 355, [125 Pac. 1071]). 179 C. at 761.

The rationale for this rule was explained by the California Court of Appeals for the First Appellate District as follows: "In such cases elementary fairness requires that the landlord demand the precise sum due, so that the tenant will know what he must do to avoid the forfeiture" (Budaeff v. Huber (1961) 194 C.A.2d 12, 18). [Bracketed material in original.]

Appellant's Reply Brief at 3-4.

Appellant continues: "The Notice of Cancellation should have set forth a precise sum which was due on the date of the notice so that [Appellant] would know the amount which needed to be paid in order to cure the default." Appellant's Reply Brief at 4. Appellant fails to recognize that such a statement would be accurate only as of the date of the notice and would necessarily contemplate that Appellant would make payment on that same date.

As noted above, the May 6, 1996, notice under Paragraph 24.1(a) of the Lease included a precise calculation of the amount due, based upon a presumption that payment would be made on a particular date, i.e., May 15, 1996. BIA abandoned this approach in its later letters, perhaps upon

concluding that it could not predict the date upon which Appellant would make payment, if it did so at all. Clearly, the approach taken by BIA in the later letters was a reasonable way of dealing with this problem and was, at the same time, fair to Appellant because BIA offered to make the precise calculation upon Appellant's request.

To the extent that California law might require a landlord to do something more than BIA did here)) a premise not supported by Appellant's argument 2/) the Board finds that such a requirement would conflict with the Federal interest in developing and protecting the use of Indian resources, because it would unreasonably burden the ability of the Federal trustee to keep Indian leases productive. The Board concludes that BIA's statement of the amount owed by Appellant was sufficient under the Lease, under Federal law, and under California law to the extent California law is applicable to the interpretation of the Lease.

Appellant's final argument is that the October 9, 1996, notice of cancellation was in violation of 25 C.F.R. § 162.14 because it did not include a demand for possession of the premises. Section 162.14 provides that, when a lease is to be cancelled, "the lessee shall forthwith be notified in writing of the cancellation of the lease and demands shall be made for payment of all obligations and for possession of the premises." The October 9, 1996, notice of cancellation included a demand for payment but not a demand for possession of the premises.

Appellant does not contend that it has suffered or will suffer any harm as a result of the omission. In light of Appellant's failure to allege harm, the Board finds that the omission was harmless error.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's October 9, 1996, decision is affirmed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

2/ Nothing in Appellant's undeveloped argument persuades the Board that the Area Director's Aug. 30, 1996, and Oct. 9, 1996, letters would not pass muster under California law. Those letters let Appellant know exactly what it must do to avoid forfeiture and so would apparently meet approval under the rationale of the California courts, as explained by Appellant.